IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.419 of 2015

Munni Rai, son of late Achuta Nand Rai, resident of 68, Chanakyapuri, P.O. B.V. College, P.S. - Shastri Nagar, District - Patna - 14.

... ... Appellant/s

Versus

1. Commissioner of Income Tax II Patna.
2. Deputy Commissioner of Income Tax, Circle - 5, Patna.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. Sriram Krishna, Adv.
For the Respondent/s	:	Mr. Rishi Raj Sinha, Sr.SC (I.T.)

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 02-05-2019

Heard Mr. Sriram Krishna, learned counsel appearing for the appellant and learned counsel for the Income Tax Department.

This appeal is directed against the judgment and order dated 28.05.2015 of the Income Tax Appellate Tribunal, Patna Bench, Patna passed in I.T.A. No.29/Pat/2012 in so far as it relates to Assessment Year 2008-2009, whereby the appeal of the appellant has been rejected and the order of the Commissioner, Income Tax-II, Patna passed in purported exercise of power vested in him under Section 263 of the Income Tax Act, 1961 (hereinafter referred to 'the Act') has been confirmed.

The issue in hand briefly stated is that the petitioner having filed his return for the assessment year in question, the returns were subjected to scrutiny and the Assessing Authority vide order passed on 30.07.2010 while rejecting the books of accounts, estimated net profit of the assessee at the rate of 7% raising fresh demand. Feeling aggrieved the appellant moved in appeal before the Commissioner of Income Tax (Appeal) against the assessment order dated 30.07.2010 which was allowed vide order dated 21.11.2011; the net profit of the assessee was estimated at the rate of 5% and the matter was remitted to the Assessing Authority for passing order afresh.

The Revenue feeling aggrieved by the order of the Commissioner, Income Tax (Appeals) dated 21.11.2011 approached the Income Tax Appellate Tribunal in I.T.A. No. 20/Pat/2012 but which has been rejected by the order passed on 03.07.2014 at Annexure-7 to the appeal.

The issue in so far as the assessment of profit is concerned, has now attained finality however, in between this exercise, another development has taken place. The Commissioner of Income Tax II in purported exercise of powers vested in him under Section 263 of 'the Act' issued notice to the appellant on 25.11.2011 and finding the assessment order dated 30.07.2010 erroneous and prejudicial to the interest of the Revenue has vide order dated 26.12.2011 directed the Assessing Authority to further examine the tax liability bearing in mind the unsecured loans/creditors.

Mr. Sriram Krishna, learned counsel appearing for the appellant informs that this order of the Commissioner Income Tax passed under Section 263 of 'the Act' was questioned by the appellant in I.T.A. No. 29/Pat of 2012 but, was rejected on 28.05.2015. He further informs that in between this period the order passed by the Commissioner, Income Tax II passed under Section 263 of 'the Act' has taken its effect and a fresh order of assessment has been passed on 06.03.2013.

Having noted the issues canvassed by Mr. Sriram Krishna in support of the appeal, as opposed by learned counsel for the Income Tax Department, we are in no confusion to hold that there was no infirmity in the exercise done by the Commissioner, Income Tax II purportedly under Section 263 of 'the Act' because the provisions of Section 263(c) suitably empowers the Commissioner to pass such order even if any appeal is pending but with a caveat, that the order passed under Section 263 of 'the Act' shall govern only such matters which was neither a subject matter nor decided in appeal.

It is not in dispute that issue on which the remand order was passed in purported exercise of powers vested in the Commissioner, Income Tax under Section 263 i.e. unsecured loans/creditors, was not a subject matter of appeal and obviously could not have because this issue had been decided by the statutory authority in favour of assessee.

In the circumstances discussed, we find no infirmity in the exercise and since the order has been acted upon to result in the fresh assessment order, we leave it open for the assessee to question the same in accordance with law but finding no issues which are in the nature of substantial question of law we refuse to grant indulgence, to dispose in this appeal.

Be noted that we have not expressed any opinion on the inter-party merits and the appellant shall be at liberty to raise all issues as he chooses to raise, to question the order passed on remand of the matter under Section 263 of 'the Act'.

This appeal is disposed of accordingly.

(Jyoti Saran, J)

(Anjani Kumar Sharan, J)

Anjula/skpathak

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	12.06.2019
Transmission Date	NA